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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SHEELA A. GIDEON,
Petitioner

vs.

RIVERSIDE COMMUNITY COLLEGE DISTRICT,
Respondent

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. Was disparate impact an issue at trial?

2. Does it constitute reversible error for the lower courts to determine disparate impact was not an issue at trial, when it was established by the evidence?

3. Did the District Court render a decision that was contrary to the evidence?

4. Did the Court of Appeals err in affirming the decision of the District Court when there was a decision contrary to the evidence?

5. Did the District Court commit reversible error in admitting into evidence subsequent employment records, reports, memoranda and other negative documents of employee beyond the scope of Smallwood vs United Airlines, Inc.?

6. Did the Court of Appeals err in affirming the decision of the District Court when trial court admitted into evidence subsequent employment records, reports, memoranda and other negative documents of employee beyond the scope of Smallwood vs United Airlines, Inc.?

7. Did the District Court commit reversible error in excluding from evidence investigative reports of the EEOC and FEHP including progress reports.

8. Did the Court of Appeals err in affirming the decision of the District Court in excluding from evidence investigative reports of EEOC and FEHP including progress reports?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioner, SHEELA A. GIDEON, prays that a Writ of Certiorari be issued to review the Judgment of the United States District Court, Central District of California, entered in the above-entitled case on September 3, 1985, and the decision of the United States Court of Appeals for the Ninth Circuit entered and filed on September 15, 1986.

OPINIONS BELOW

The Finding of Facts and Conclusions of Law of the United States District Court is unreported and is printed in Appendix "A" hereto, infra., Page A 4-22. The Judgment of the United States District Court is printed in Appendix "A" hereto, infra, Page A 23-25. The Memorandum of the United States Court of Appeals for the Ninth Circuit is

unreported and is printed in Appendix "A" hereto, infra, Page A 1-3.

JURISDICTION

The Judgment of the United States District Court and the decision of the United States Circuit Court for the Ninth Circuit was entered on September 3, 1985 and September 15, 1986 respectively. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Was disparate impact an issue at trial?

2. Does it constitute reversible error for the lower courts to determine disparate impact was not an issue at trial, when it was established

by the evidence?

3. Did the District Court render a decision that was contrary to the evidence?

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8. Did the Court of Appeals err in affirming the decision of the District Court in excluding from evidence investigative reports of EEOC and FEHP including progress reports?

STATUTE INVOLVED

42 U.S.C. Section 2000e

Federal Rules of Evidence, Rule 803(8)

STATEMENT OF CASE

Petitioner GIDEON filed an employment discrimination action against Respondent RIVERSIDE COMMUNITY COLLEGE DISTRICT alleging that said school district failed or refused to hire and/or

discharged her or otherwise discriminated against her with respect to her compensation, terms, conditions, or privileges of employment because of her national origin in violation of 42 U.S.C. Section 2000e-2(a)(1). She also alleges in her complaint that after she filed charges of discrimination against RIVERSIDE COMMUNITY COLLEGE DISTRICT with governmental agencies, the school district retaliated against her by failing to reemploy or hire her for the position which she had applied for and was qualified for in violation of 42 U.S.C. Section 2000e-3. On November 2, 1984, orders were issued for Court trial to commence on March 5, 1985. On February 12, 1985, Petitioner submitted both Findings of Fact and Conclusions of Law an filed a Notice of Motion and Motion in Limine: Motion to Exclude

Evidence and set the matter to be heard on March 5, 1985. Opposition was filed to said Motion in Limine. The Motion was heard on March 5, 1985, and the trial judge ruled that such Motion would be addressed upon the conclusion of Petitioner's Case-in-Chief. The first witness was sworn and testimony commenced on March 5, 1985. Trial was also conducted on March 6, 7, 8, 13 and 14, 1985. At the conclusion of GIDEON's Case-in-Chief, Respondent made a Motion to Dismiss the case on the basis that GIDEON had failed to establish a prima face case of sex discrimination and retaliation The district court denied the Motion to Dismiss and stated that GIDEON had met her burden of establishing a prima face case. GIDEON's Motion in Limine to Exclude Evidence was heard on March 13, 1985 and the Court denied said

Motion in Limine and permitted into evidence subsequent employment records, reports, memoranda and other negative documents of employee GIDEON. On September 3, 1985, Judge Stotler signed Findings of Fact and Conclusions of Law finding no basis for discrimination or retaliation on the part of RIVERSIDE COMMUNITY COLLEGE DISTRICT toward GIDEON. A final judgment was entered September 26, 1985. On October 16, 1985, GIDEON filed a Notice of Appeal.

STATEMENT OF FACTS

GIDEON applied for the 1977 full-time nursing instructor position and was screened as to the minimum qualifications set forth in the job announcement. MS. GIDEON fulfilled all minimum qualifications and was given an oral interview before four individuals of

the selection committee. She was not one of the three successful applicants sent to the President of the College for an interview. She possessed quantitatively more practical nursing and teaching experience than other applicants.

In the Findings of Facts and Conclusions of Law, the District Court found and concluded that disparate impact was not an issue at trial and was raised for the first time in GIDEON's written summation. This conclusion of law is inconsistent with the Findings of Fact referred to in that same document. Reference was made at Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 that evidence was received by the Court establishing the protocol for screening and selective applicants for full-time permanent teaching positions with the District. The

protocol was established by RIVERSIDE COMMUNITY COLLEGE DISTRICT for a particular purpose and that purpose was to refute disparate impact theory of discrimination. During the course of the trial, reference was made to this disparate impact theory when testimony established that there was absence of an objective criteria for ranking, rating, and determining the appropriate responses to questions asked during the interview process, thereby rendering the entire selection process subject to the arbitrary and subjective discretion of the selection committee members allowing them to incorporate racial attitudes and bias into the process. During open statement of GIDEON, specific mention was made to the absence of objective criteria and guidelines at Riverside Community College in selective candidates for

full-time teaching positions. Such opening statement by GIDEON's counsel set the stage for a disparate impact showing. Evidence was produced by GIDEON at trial upon direct and cross-examination of witnesses that the absence of written or oral guidelines and criteria in which to rank, rate or grade applicants and their responses leaves too much discretion to selection committee members. Without guidelines, performance at the oral interview could be solely predicated on applicant's speaking skills and communication. A person of foreign extraction would, as a general rule, not have the same comparable speaking skills as a United States citizen/applicant. The actual decision as to the correctness of each applicant's response during the selection process was within the discretion of each particular committee

member. There was no written policy that the committee members must discuss prior to the interview the correct responses to each question asked during the interview. There was no requirement that committee members during or after the oral interview must review the application file and resume of the applicant or go through that applicant's qualifications before determining the best qualified candidate. There is no written requirement that selection committee members review the application during the interview. The affirmative action plan that is in place with RIVERSIDE COMMUNITY COLLEGE DISTRICT does not require the interview team to utilize the application packet during the interview process. The selection committee is not required to write out the verbal response of each applicant to the series of questions

asked during the interview process. The committee member is only required to submit the rating of the applicant during the oral interview process. Testimony of the former Superintendent of Riverside City College shows that the affirmative action plan in effect with RIVERSIDE COMMUNITY SCHOOL DISTRICT did not set down prescribed written or oral standards or criteria for determining the appropriateness or correctness of the response given during the oral interview process. Although the affirmative action plan did not set down precise criteria for determining who is the best qualified candidate to be interviewed by the President, sometimes the Dean of Academic Services occasionally and verbally issued instructions to committee members as to who would be regarded as the best qualified candidate. The interpretation

of the appropriateness of each response and whether such response warranted a superior, average or unsatisfactory ranking, was solely within the discretion of each committee member. There was no written criteria for determining the appropriateness or correctness of said response. There never was any verbal instructions given as to determining the appropriateness of the response. There were no verbal or written instructions given that should a committee member feel certain prejudice towards an applicant, that he or she should disqualify himself/herself from the committee. The applicant could not employ any specific process to challenge the constitution of the committee if he felt that certain committee members were prejudice toward applicant or to take steps to have them disqualified. Cross-examination also

revealed the absence of an oral or written charge requiring committee members to review the qualifications and application of each individual applicant. There is no specific charge or instruction given that committee members must review the application at the Stage 4 process, the interview process. Cross-examination of RIVERSIDE COMMUNITY COLLEGE DISTRICT's witness, Howard B. Larsen, supports the view that GIDEON did not have a problem communicating, but more of an enunciation problem associated to her East Indian accent. Mr. Larsen went on to testify that the speaking ability of the applicant is a variable to be considered in the interview process. There are no instructions to selection committee members that they are not to hold the accent of any applicant against him/her when applicant is before the

interview committee. There was ample evidence produced at time of trial to support the disparate impact theory of discrimination. Disparate impact arises from a selection and screening process that is devoid of objective criteria, prescribed standards, and systematic determination of the appropriateness and correctness of responses given to questions during the oral interview process and of the overall ranking, rating, and grading of applicant during the selection process. Without an affirmative action charge or instruction given or guidelines to be followed, the committee members were permitted unconstrained license to transform the oral interview into a speech tournament. The issue of the speaking ability of the applicant during the oral interview process raises the disparate impact

issue.

The issue of disparate treatment was fully developed at the time of trial with evidence showing that GIDEON was discriminated against because of her national origin. Two of the committee members sitting on the selection committee during the oral interview for the 1977 full-time permanent nursing instructor position exhibited prejudice and bias towards GIDEON. One of the committee members by the name of Ms. Rojakovick had on prior occasions made certain derogatory and discriminatory remarks concerning Ms. GIDEON. Her remarks were made about Ms. GIDEON's attire, namely, the wearing of her sari on campus. Such dress is a customary dress worn by East Indians. Ms. Rojakovick had commented that the sari GIDEON wore was ridiculous. Ms.

Rojakovick showed prejudice by writing a letter of recommendation for another applicant for the 1977 nursing instructor position -- the same position GIDEON had applied for -- yet failed to write a recommendation for GIDEON after GIDEON had requested her to write a recommendation for her to that position. Ms. Rojakovick did not write said letter of recommendation for GIDEON. Testimony developed showing Ms. Rojakovick was a co-instructor with GIDEON at Riverside City College and that she was the coordinator of the nursing department. She had a duty to keep GIDEON informed of the grading policy. Because of Rojakovick's failure to keep GIDEON informed of that policy, a grading policy dispute arose. Rojakovick employed a systematic exclusion of GIDEON from the other nursing instructors. Rojakovick

showed prejudice to dark-complexioned people. A student went to the Director of Nursing and had complained that Ms. Rojakovick was prejudiced against her because of her race -- Black. Evidence was adduced at time of trial that Ms. Rojakovick would sit in the rear of Ms. GIDEON's class secreted behind folding doors, and take notes on the lecture given by GIDEON, and then when her class followed GIDEON's, she would go through and correct GIDEON's lecture. Ms. Rojakovick also treated Black students differently from her other students. She gave specific seating designation to Black students, whereas Caucasion students did not receive specific seating assignments. She assigned Blacks particular seats in her classroom. Black students received failing grades from Ms. Rojakovick whereas Caucasion students

received higher grades. There was another selection committee member that had exhibited pre-oral interview prejudice toward GIDEON. Thelma Carey stated directly to GIDEON that she does not like Indians because they look alike they do everything alike. Such statement by Carey is direct evidence of discrimination. It was stipulated by the parties that the three applicants selected to be interviewed by the President in 1977 were caucasion. It was further stipulated that GIDEON was not selected for an oral interview with the President. It is undisputed that the selection committee for the 1977 full time permanent nursing instruction position consisted of James Duncan, Dorothy Steck, Phyllis Rojakovick and Thelma Carey. It is further undisputed that the individuals selected for the

oral interview for the nursing instructor position in 1977 were SHEELA GIDEON, Helen Strutz, Ruth Sanders, Patricia Hora and Thera Sass. Of the three individuals selected, GIDEON was the best qualified for the permanent full-time teaching position in 1977. Testimony shows that Ms. GIDEON had taught nursing from 1959-1968 on a regular basis. She taught at Osmania University School of Nursing from 1968-1973. She came to the United States in 1972 and enrolled in a graduate program at Loma Linda University Medical School and became employed at Loma Linda University Medical center as a registered nurse. She further taught at Chaffey College from 1975-1976 and started teaching at Riverside City College in approximately 1975. She worked at Miloufer Hospital, India, from 1956 to 1968. The total teaching experience of

GIDEON amounted to, prior to 1977, 15 years and approximately 20 years of practical nursing experience. GIDEON possessed a B.S. degree in Nursing, Medical/Surgical and a teaching minor and a M.S. degree in Nursing. The applications and resumes of the three individuals selected to be interviewed by the President, Thera Sass, Patricia Hora, and Ruth Sanders, did not have practical nursing experience or teaching experience that would even closely equal GIDEON'S. Upon the conclusion of Plaintiff's Case-in-Chief, the Court found that GIDEON had met her burden of establishing a prima facie case and denied a Motion to Dismiss under Federal Rules and Civil Procedures Section 41b. The finding by the Court that GIDEON had established a prima face case was not specifically directed to a disparate treatment theory

of discrimination. Absent such a statement by the Court there is a body of evidence presented that support recovery under both the disparate treatment and disparate impact views.

Prior to trial, RIVERSIDE COMMUNITY COLLEGE DISTRICT sought to introduce Exhibits 237-271 dealing with prior and subsequent employment history of GIDEON. GIDEON filed a Motion in Limine to exclude such evidence. (See Motion in Limine/Motion to Exclude Evidence). Such matter was noticed to be heard on March 5, 1985, but was heard by the Court on March 13, 1985, and such motion was denied. Supplemental memoranda was submitted by both parties on this motion. The District Court Judge cited the Smallwood vs. United Airlines case as to permitting such inquiry and allowed into evidence, over objection,

the prior and subsequent employment histories of GIDEON. Such Exhibits were introduced and admitted into evidence and involved, among other things, disciplinary, personnel matters, packets of employment records with previous and subsequent employers and negative aspects arising form that relationship.

The District Court excluded from evidence the Fair Employment Housing Commission's progress report that had been identified as GIDEON's Exhibit 129 for identification. The District Court denied the admission of the progress notes of the Fair Employment Housing Commission and such exclusion from evidence has defeated Plaintiff's attempt at showing facts surrounding the investigation that was conducted by the FEHC, the statistics utilized in determining the strength of GIDEON's

case, statements and other documents supporting the discrimination and retaliation. Based on the foregoing statement of facts, GIDEON set forths the reasons for granting this Writ:

REASONS FOR GRANTING THE WRIT

1. TRIAL COURT ABUSED ITS DISCRETION AMOUNTING TO PREJUDICIAL ERROR IN CONCLUDING THAT DISPARATE IMPACT WAS NOT AN ISSUE AT TRIAL.

It was expressed throughout the trial that the candidate selection process in effect at Riverside Community College District was without precise standards and guidelines as to ranking, grading and rating individual applicants for full-time permanent nursing instructor positions at Riverside City

College. Selection committee members were not given any charge or instruction as to the correctness of individual applicants' responses during the oral interview or what criteria were to be employed by each committee member to determine the ranking or rating of each applicant with others. Testimony was received by RIVERSIDE COMMUNITY COLLEGE DISTRICT's witness that the speaking ability of the applicant is an important variable at the oral interview. Testimony was also received that MS. GIDEON did not have a communication problem, but one more in line with an enunciation difference associated to her accent. In the absence of precise standards and guidelines to determine the correctness of the response given by each applicant, and in the absence of criteria and guidelines to determine how to rank,

rate and grade the individual responses, the speaking ability of the applicant became the primary issue at the oral interview. Evidence was also received at trial that selection committee members were not charged or instructed to review the application and resume of the applicant prior to, at the time of the oral interview, or up to the time a decision which three applicants were to be sent to the President of the college for a second oral interview. GIDEON has made a prima facie showing of discrimination based on a disparate impact theory of recovery. This disparate impact showing is partially reflected in the Findings of Facts made by the trial judge. Findings of Fact Numbers 10 through 20 articulate the steps involved in the hiring process. Finding Number 12, subparagraph (b)

states that a select number of candidates, as a result of the initial screening are interviewed by the same screening committee. The screening committee selects three candidates to be interviewed by the Superintendent. Finding Number 18 states each committee member fills out his or her evaluation of the candidate's answer to each particular question during the interview. Finding Number 19 states that after all the interviews are completed, the committee members will discuss who they will choose for the Superintendent to interview. They are to reach a consensus on the two or three candidates to be interviewed by the Superintendent based upon their individual interview evaluations and collective decision. What those findings have left out are serious questions regarding the evaluation process. There

was a substantial body of evidence received at trial that there were no guidelines to determine the appropriateness and correctness of each response or the ranking, rating or grading of those responses. The Findings of Fact are deficient in this regard and essentially ignore the important issues of disparate impact that were raised. The four elements of the McDonnell Douglas vs. Green, 411 U.S. 792, are not necessary for GIDEON to prove on a disparate impact case. That four-prong test applies simply to disparate treatment cases. It has been held that the McDonnell Douglas test is irrelevant in a disparate impact case. The McDonnell Douglas court itself emphasized, "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie

proof required from Plaintiff is not necessarily applicable in every respect differing factual situations." 411 U.S. at 802. The burden of production of evidence is also different in a disparate impact case. The trial judge in Conclusion of Law Number 2 recites the prima facie showing of discrimination of the McDonnell Douglas test as referenced in Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981). The trial judge then recites that upon the meeting of a prima facie showing of discrimination, the inference of discrimination can be rebutted by some legitimate, nondiscriminatory reason for the employer's conduct. Once a legitimate reason is offered to rebut the inference, then the employee must prove that it is pretextual. That conclusion of law as it pertains to the shifting of

the burden of production does not apply to disparate impact cases. The Fifth Circuit recently held that the Burdine standard for allocation of the burden of proof in Title VII cases does not apply to disparate impact cases. Johnson vs. Uncle Ben's, Inc., 657 F.2d 750 (Fifth Circuit, 1971). In that case, the Court held that the Plaintiff does not have the burden to prove that the employer did not have a legitimate business reason for the challenge to discriminatory practices. It has been held in disparate impact cases that the employer must provide evidence charging that the challenge test or requirement bear a manifest relation to the employment in question. Dothard vs. Rawlinson, 433 U.S. 321 (1977). The burden of production in disparate impact cases requires the employer to show a business necessity to rebut the inference

of discrimination. The business necessity defense has been generally "narrowly construed and confined to those unusual instances where segregative policy is absolutely essential to the achievement of a legitimate business need." Chrapliwy vs. Uniroyal, Inc.. 458 F.supp 252 (1977). See Nashville Gas Company vs. Satty, 434 U.S. 136 (1977), (Defendant failed to prove that policy of denying cumulated seniority to female employees returning from pregnancy leave was justified by the business necessity); Jackson vs. Seaboard Coastline Railroad, 678 F.2d 992 (Eleventh Circuit 1982) (test requires overriding legitimate business purpose); United States vs. City of Chicago, 549 F.2d 415 (Seventh Circuit), cert denied, 434 U.S. 875 (1977). The burden of production is on the Defendant to establish such business

necessity defense. Turner vs. Texas Instrument, Inc., 555 F.2d 1251, 1254-55 (Fifth Circuit 1977(; Firefighters Institute for Racial Equality vs. The City of St. Louis, 549 F.2d 506 (Eighth Circuit), cert denied, 434 U.S. 819 (1977); E.E.O.C. vs. E.I. Dupont du Nemours Company, 445 F. supp. 223 (D. Del. 1978).

The disparate impact theory was raised at the time of trial and was referenced and inferred to in the Findings of Facts and Conclusions of Law and it amounted to reversible error for the Court to state at Conclusion of Law Number 15 that disparate impact was not an issue at trial. It has been held that errors of law, which will result in reversal, exist, if the fact findings or conclusions are manifestly or clearly wrong of erroneous, contrary to the

evidence, obviously or clearly against the weight of the evidence, without support in the evidence, as where it is manifest that the findings are so plainly unjustified, by the evidence when the interests of justice necessitates their nullification. Garfield vs. People's Finance and Thrift Company of Riverside 24 CA2d 144, 74 P2d 1061; Casper vs. City of Los Angeles, 295 P2d 452, 140 C.A.2d 433, Vice vs. Thacker, 180 P2d 4, 30 C.2d 84. Snokelberg vs. Crecelius, 280 P.2d 109, 131 CA2d 136. An error at law requiring reversal may exist where the findings or conclusions are due to, or colored by, an error or in misconception of law, or a capricious disbelief in the disposition of the case or an abuse of discretion, on the part of the trial judge. Furthermore, the judgment should be reversed when the facts found by the

court, supplemented by those he should have found, will support a judgment for the Petitioner. Lufkin vs. Patten-Blinn Lumber Company, 59 P2d 414, 15 CA2d 259. By the case law, the Petitioner Court will always review to determine whether findings made support the judgment rendered, or the ultimate conclusion drawn. Hudson vs. Becker, 56 P.2d 249, 12 C.A.2d 743. Conclusions or ultimate findings are subject to review and correctness where they have been reached by way of deduction and inference from probative or subordinate facts, or where the findings are deduced or inferred from facts found by the Court and will be set aside if the inference or conclusion was erroneous or entirely unwarranted. Wells vs. Comstock, 295 P.2d 961, 4 C3d 528. Ruddleson vs. Paules, 264 P 1096, 203 C. 453. Laine vs. Weddell, 173 P.2d 567, 76

CA2d 613. This reversible error was committed when the trial judge concluded that disparate impact was not an issue at trial when the Findings of Fact support directly and by way of inference a disparate impact theory.

2. **NINTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT DECISION FINDING AND CONCLUDING THAT DISPARATE IMPACT WAS NOT AN ISSUE AT TRIAL.**

The Ninth Circuit Court of Appeals erred in concluding that Gideon failed to establish that Riverside's hiring practices had a substantial adverse impact on a group protected by Title VII. The Court did not wrestle with the primary issue: Was disparate impact an issue at trial? The issue was not to what degree did it impact upon a protected group. The District Court

simply concluded that disparate impact was not an issue at trial without further reason given. It was established at trial that the oral interview before the selection committee was tantamount to a speech contest when selection committee members were not given any instructions or guidelines as to what they were suppose to do during the interview or what or how they were suppose to grade applicants. It was also established at trial that foreign born applicants with English as a second language could and would not perform as well as their American English-speaking counterparts. Thus, disparate impact was an issue at trial and it was error for the Ninth Circuit to affirm the District Court and state that even if disparate impact was properly raised a trial, it would have been harmless error. The Ninth Circuit

was wrong. If disparate impact was established at trial, it would have been reversible error for the District Court to determine it was not an issue.

3. **TRIAL COURT ABUSED ITS DISCRETION IN RENDERING A DECISION CONTRARY TO THE EVIDENCE.**

The trial judge attached little or no weight to the evidence that Ms. Rojakovick had exhibited discrimination toward Black students in her class by the setting up of specific assigned seating for Blacks and no assigned seating for Caucasian students. Evidence as to discrimination of another selection committee member, who states she did not like Indians, had little or no affect upon the decision of the trial judge. Such evidence raises a strong evidence of

disparate treatment. Case law supports the principle that the McDonnell Douglas test does not apply to direct evidence of discrimination. Trans World Airlines vs. Thurston (1985) 105 S.Ct. 613. Teamsters vs. United States 431 U.S. 324, 358 (1977). The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that Plaintiff has his day in court despite the unavailability of direct evidence. Leob vs. Textron 600 F.2d 1003, 1014 (1979). In the TWA case, the court stated that "there is direct evidence that the method of transfer available to a disqualified captain depends upon his age. Since it allows captains who become disqualified for any reason other than age to bump less senior flight engineers, TWA's transfer policy is discriminatory on its face. Los Angeles Dept. of Water and Power vs.

Manhart 435 U.S. 702, 98 S.Ct. 1370 (1978), (employer's policy requiring female employees to make larger contributions to pension fund than male employees is discriminatory on its face)." Two of the four selection committee members had exhibited prejudice toward GIDEON in the past. They were allowed to sit on the selection committee although there is evidence to show that there is an absence of policy or procedure requiring committee members to disqualify themselves if they felt certain prejudices or bias toward any individual applicant. An interview selection committee should be free or purged of any implied bias toward an applicant. There should be standards in place that would promote impartiality relative to race and national origin discrimination that would be tantamount

to the selection of impartial jury in removing all possible prejudice from the process. Absent sufficient guidelines for disqualification or ferreting out implied bias, a disparate impact case has merit. It is undisputed by the testimony that there are no steps employed in the disqualification of committee members if they felt bias or had exhibited prejudice toward applicants. The affirmative action plan in effect at RIVERSIDE COMMUNITY COLLEGE DISTRICT is of little use if the selection committee members have complete arbitrary discretion in determining what applicant is qualified and what applicant is not. If racial and prejudicial influences have not been completely eliminated from the firing process, what good is the affirmative action program. There was evidence to show that Thelma Carey and Phyllis

Rojakovick had prior to the oral interview manifested racial and national origin bias toward GIDEON. In spite of that, both committee members sat in judgment of MS. GIDEON, not disqualifying themselves because of bias toward GIDEON, but instead chose not to send MS. GIDEON on to interview with the President or Superintendent. The trial judge did not render any Findings of Fact or Conclusions of Law as to the absence of disqualification procedures in purging the hiring process or racial and national origin discrimination. RIVERSIDE COMMUNITY COLLEGE DISTRICT did not establish a legitimate business reason or business necessity for not setting down precise written guidelines for disqualification of committee members exhibiting bias, or for purging the selection process of selection committee

members biased in areas of race and national origin discrimination. Compounded on top of this, RIVERSIDE COMMUNITY COLLEGE DISTRICT has failed to show a legitimate business reason or business necessity for the absence of specific precise standards, guidelines, and objective criteria for determining the correctness of responses given by applicants to questions posited by the committee and for the rating, ranking, and grading of those responses. Based on the foregoing facts and rationale, the unrefuted evidence at trial tends to support disparate treatment and disparate impact discrimination based on national origin. Without sufficient refutation, the decision of the trial judge is not supported by the evidence. The trial judge has abused her discretion in so deciding contrary to the evidence. It

has been held that in reviewing sufficiency of findings to support judgment, the reviewing court will regard ultimate facts found and may disregard findings as to evidentiary facts. In re Moore's Estate, 300 P2d 110, 143, CA2d 64, Miller vs. Pacific Pipeline Construction Co., 291 P2d 534, 138 CA2d 187.

4. **NINTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING DISTRICT COURT DECISION THAT WAS CONTRARY TO THE EVIDENCE.**

Ninth Ciruit ruled that this ground for appeal did not warrant reversal, but offered no underpinnings to support it ruling. Therefore, Petitioner incorporates Reason No. 3 above hereat.

5. **TRIAL JUDGE ABUSED HER DISCRETION AMOUNTING TO REVERSIBLE ERROR IN**

ADMITTING EVIDENCE OF PRIOR AND SUBSEQUENT EMPLOYMENT RECORDS, REPORTS, MEMORANDUM AND OTHER NEGATIVE EVIDENCE OF EMPLOYEE.

The trial judge relied upon Smallwood vs. United Airlines, Inc., (1984) 728 F2d 614, in admitting into evidence prior and subsequent employment history records, reports, memoranda, and other negative data of GIDEON. The court stated that the evidence of the prior and subsequent employment history of GIDEON does not go to the discrimination/liability portion of the case but rather to the remedial phase. (Reporter's Transcript, 3-13-85, Page 54, Lines 15-16) At Findings Numbers 61, 62, 63, 64, and 65 show the court's reliance on said prior and subsequent employment history of GIDEON. The Findings of Fact

do not specifically mention evidence in issue was admitted for evidentiary purposes of discrimination or for the remedial phase. To the contrary, it can be viewed by the sequence of said findings that the court placed emphasis upon that evidence in finding no discrimination or retaliation on either a disparate treatment or a disparate impact theory of discrimination. Such evidence is highly prejudicial to GIDEON in that it paints a negative profile of GIDEON to her detriment. It is a difficult case to establish discrimination by an employer, and to that burden the employee should not have to refute evidence of prior and subsequent employment history, which is entirely irrelevant to the issues at large. The court in Smallwood vs. United Airlines, Inc. permitted the introduction into evidence of the prior employment

histories of employee. The rationale for such introduction into evidence is rooted in the Mount Healthy City Board of Education vs. Doyle (1977), 429 U.S. 274. at 285-287 which was later specifically applied in the employment discrimination context in the companion cases of Teamsters vs. U.S., (1977), 431 U.S. 324, 326 and East Texas Motor Freight vs. Rodriguez, 431 U.S. 395, 403-404, (1977), that the company is entitled to prove at trial that the employee had not been discriminated against when there were other factors to show that he was not qualified or would not have been hired in any event. The court in Smallwood differentiates between the discrimination or liability portion of the case from the remedial or relief state of the case. Rationale for the Mt. Healthy rule is that the right to back pay does not exist

if the employee would not have been hired absent discrimination because such right is authorized not as a punishment for the employer or as a windfall for the employee but only to put the employee in the same position but in no better position than he would have been had there been no discrimination. The court in Smallwood permitted such evidence to show that upon the complete processing of Petitioner's application, including all inquiries, such negative prior employment history would have been discovered in the normal process of candidate selection and investigation and that employee would not have been hired based on those facts later discovered. The court in Smallwood at Page 626 specifically states: "The question is whether the Plaintiff (employee) would not have been hired had the Defendant (employer) followed its

normal procedure and processed the Plaintiff's application as it did all others. Such processing would have included inquiries of the Plaintiff's former airline employer as listed on his application form. That inquiry would have elicited the full evidence of the circumstances of Plaintiff's discharge by ONA. The information received from ONA (prior employer) would have meant that Plaintiff would never had been hired by the Defendant as a flight officer". Even, assuming arguendo, that the employer would not have hired GIDEON because of her prior employment history, there was no evidence at trial to show that there would have been any post-interview inquiries of the references contained on the application submitted by GIDEON. Smallwood is distinguishable from this case, in that

it was never proven by RIVERSIDE COMMUNITY COLLEGE DISTRICT that there was a usual and customary processing of the application after the final interview with the President or Superintendent of the college. Moreover, GIDEON presented sufficient evidence to rebut some of that prior negative employment history. As it pertains to the subsequent employment history, the Smallwood case does not stand for the proposition that the employer can delve into subsequent employment histories during the course of the pending case to establish negative aspects to justify why it would not have hired the employee under those circumstances. Respondent was permitted to introduce into evidence the employment histories from 1977 to 1981. The introduction into evidence of the subsequent employment history of GIDEON

interferes with the primary burden of GIDEON's case of discrimination and retaliation. The Murnane vs. American Airlines, Inc. case (1979), 482 F.supp. 135, 148, dealt with incidences occurring months after the employer had refused to process employee's application because of age. But Murnane does not apply to subsequent employment history that occurs years after the alleged discriminatory act. Murnane specifically deals with that time frame for the processing of the entire application. Murnane and Smallwood stand for the proposition that although discrimination may have occurred prior to the normal completion of the application process, if other evidence develops during the processing that would have disqualified or would provide the basis for not hiring an employee, that evidence is admissible. The trial court

has misinterpreted Smallwood in permitting both the prior and subsequent employment history to be introduced into evidence because of the remedial phase of this case. Policy of Mt. Healthy and Smallwood is to permit evidence relative to the back pay issue, not to carve out a new exception to the rules of relevancy and specific instances of misconduct. It is a general rule that the finding of violation of Title VII presumptively entitles the victim of discrimination to back pay and retroactive promotion or reinstatement. Franks vs. Bowman Transportation Company (Fifth Circuit 1974), 495 F.2d 398; Albemarle Paper Company vs. Moody (1975), 422 U.S. 405. In accordance with the above presumption of entitlement to back pay and retroactive promotion or reinstatement, an individual who prevails at the

liability stage should be awarded back pay and retroactive promotion or reinstatement unless the employer can prove by clear and convincing evidence that the employee would not have been hired, promoted, even if there had been no discrimination. Day vs. Mathews (D.C. Circuit 1976), 530 F.2d 1083. It has been held that a judgment will be reversed where the ruling of the court granting or denying a motion to strike evidence is prejudicial to the party complaining. It is undisputed that GIDEON filed a motion to exclude such evidence at the outset of the trial, but later the trial judge denied said motion and permitted the introduction into evidence of the subsequent employment history of GIDEON. Such employment history is emphatically prejudicial. Such judgment or decision should be

reversed. In Re Peters' Estate, 244 P.2d 88, 110 C.A.2d 723. Wysock vs. Borchers Brothers, 232 P.2d 531, 104 C.A.2d 571. Such error constitutes grounds for reversal where it results in substantial prejudice. Bennett vs. Spagele, 113 P.2d 207. Where, during the trial of the cause, evidence that is not germane to the issues involved creeps into the record, it becomes the duty of the Appellate Court to determine whether the error is prejudicial to any of the parties involved. It has been said to be well settled that the admission of incompetent evidence is a prejudicial error. Farm Lance Association, 225 P 291, 65 C.A. 727. Similarly, prejudicial error results from the admission of incompetent evidence where the reviewing court cannot determine what weight and influence such evidence had on the trial

court. Dolton vs. Green, 164 P.2d 795, 72 C.A.2d 427. Nishi vs. Inoguchi, 2 P.2d 864, 116 C.A. 398. Where it has been held that in all events, the judgment of the trial court hearing a case without a jury will ordinarily be reversed for the admission of proper evidence only where it appears that the court was influenced by the improper introduction of evidence or that the evidence admitted was essential to the findings, that the evidence affected the decision, that the decision was based on whole or in part on such evidence, or that the Petitioner was harmed by the error, or where the Appellate Court cannot determine whether or not the trial court was influenced by the evidence erroneously admitted. The trial judge has abused her discretion amounting to a reversible error in admitting evidence of

the subsequent and prior employment history, records, reports, memoranda, and other data concerning GIDEON without a specific finding that such evidence was only considered for the remedial portion of the case, and by admitting such evidence in excess of the scope permitted in Smallwood vs. United Airlines, thereby carving out new exceptions to the relevancy and specific instances of misconduct rules.

6. **NINTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTICT COURT DECISION TO ADMIT EVIDENCE OF PRIOR AND SUBSEQUENT EMPLOYMENT RECORDS, REPORTS, MEMORANDUM AND OTHER NEGATIVE EVIDENCE OF EMPLOYEE.**

Ninth Ciruit erred in affirming the District Court's decision to permit subsequent employment records into evidence for a limited purpose. The

error arises when the Ninth Ciruit states it is permissible for the District Court to examine Gideon's employment history if discrimination or retaliation is established for purposes of determining remedy, but then it states that discrimination or retaliation was not established so it did not have to consider that evidence. Yet, the Ninth Circuit goes on to state that it was not persuaded that such evidence may have been referred to in the Findings of Fact. The Ninth Circuit has missed the point. The District Court considered such subsequent employment history when remedy had never come into play. It was reversible error for the District Court to give any weight to subsequent employment history that was admitted for the limited purpose of remedy.

7. **TRIAL COURT ABUSED ITS DISCRETION AMOUNTING TO REVERSIBLE ERROR IN EXCLUDING EVIDENCE OF THE INVESTIGATIVE REPORTS OF THE EEOC AND FEHP INCLUDING THE PROGRESS REPORTS.**

Federal Rules of Evidence, Rule 803(8) specifically permits "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, of (B) matters observed pursuant to duty imposed By law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,

unless the sources of information or other circumstances indicate lack of trustworthiness." The court in Smith vs. Universal Services, Inc., (Fifth Circuit 1972) 454 F.2d 154 specifically permitted the EEOC report, consisting of a summary of the charges, a brief review of the facts developed in its investigation, and its finding of probable cause that violations exist, and held that such documents are admitted as exceptions to the hearsay rule and admissible under the Federal Business Records Act. The court there held the report involved was prepared by an investigator for the EEOC, pursuant to its statutory mandate, and was not prepared in anticipation of litigation. The Commission is not a party to the litigation and can have no interest therein. The investigator had no personal involvement in the situation.

There is no reason to suspect any lack of trustworthiness. It was held in Dickerson vs. Metropolitan Dade County, 659 F.2d 574, 579, (Fifth Circuit 1981) "that the district court was obligated to admit into evidence the EEOC investigative report and findings because the probative value outweighed any possible prejudice to the employer." In Peters vs. Jefferson Chemical Company, (Fifth Circuit 1975), 516 F.2d 447, the court stated that the trial court's reluctance to admit introduction into evidence of the EEOC investigative files is plainly apparent and that such reluctance was unwarranted. In Garcia vs. Gloor (1980), 618 F.2d 624, 272, the court held there that the district judge was indeed in error in refusing to admit the investigative report and determinations of the EEOC. The policy

surrounding the introduction and admission into evidence of the EEOC determination and report is that such report is prepared by professional investigators on behalf of an impartial agency, having highly probative evaluation of an individual's discrimination complaint. A civil rights Plaintiff has a difficult burden of proof and should not be deprived of what may be persuasive. Plummer vs. Western International Hotels Company, Inc., (1981) 656 F.2d 502, 505. In Plummer vs. Western International Hotels Company, Inc., the court cited Chandler vs. Roudebush (1976), 425 U.S. 840, 863 in which that court held that a Civil Service Commission report was admissible in a federal employee's Title VII case stating that prior administrative findings made with respect to an

employment discrimination claim, may, of course, be admitted into evidence at a federal sector trial de novo. It was an abuse of discretion amounting to prejudicial error for the trial judge not to permit the EEOC progress reports.

8. **NINTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT DECISION TO EXCLUDE EVIDENCE OF THE INVESTIGATIVE REPORTS OF THE EEOC AND FEHP INCLUDING THE PROGRESS REPORTS.**

Ninth Circuit ruled that this ground for appeal did not warrant reversal, bu offered no underpinnings to support this ruling. Therefore, Petitioner incorporates Reason No. 3 above hereat.

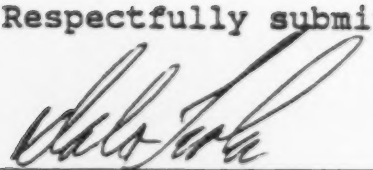
CONCLUSION

Based on the foregoing errors

of law that have constituted reversible error in the above-entitled case, the court should remand these proceedings to the lower court for a new trial on the merits and award reasonable attorney's fees in the presentation of this Writ, along with costs of suit incurred herein.

DATED: December 9, 1986

Respectfully submitted,

By: 

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHEELA A. GIDEON, Plaintiff-Appellant, vs. RIVERSIDE COMMUNITY COLLEGE DISTRICT, Defendant-Appellee.	No.: 85-6384 D.C. No.: CV 82-4903 MEMORANDUM*

Appeal from the
United States District Court
for the Central District of California
Alicemarie H. Stotler
District Judge, Presiding

Argued and Submitted August 6, 1986
Pasadena, California

Before: ANDERSON, PREGERSON and
REINHARDT, Circuit Judges

Sheela A. Gideon, a native of India, appeals from the district court's holding that Riverside Community College District neither discriminated nor retaliated against Gideon due to her national origin

as prohibited by 42 U.S.C. Sections 2000e-2(a)(1) and 2000e-3. We affirm.

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*This disposition is not intended for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Two issues raised by Gideon merit specific discussion. First, Gideon argues that the district court erred in ruling that disparate impact was not properly raised at trial. We disagree. Moreover, at trial, Gideon failed to establish that Riverside's hiring practices had a substantial adverse impact on a group protected by Title VII. Because a showing of substantial adverse impact on a protected group is necessary to establish a case of disparate impact, Low v. City of Monrovia, 755 F.2d 998, 1004 (9th Cir. 1985), amended 784 F.2d 1407 (9th Cir. 1985), even if the district court erred in ruling that disparate impact was not properly raised, such error would have been harmless.

Second, Gideon argues that the district court erred in admitting evidence of Gideon's prior and subsequent

employment history. Gideon's employment history established that employers other than Riverside disciplined Gideon for insubordination and threatening a co-worker, and terminated Gideon on unfavorable terms. Gideon argued that such evidence should not be admitted, because it was not available to Riverside when it made its hiring decision. However, the district court admitted the evidence for use only in connection with the issue of the appropriate remedy and not in connection with the question whether a violation of the statute had occurred. We have held that admitting evidence for a limited purpose, as the district court did here, is permissible. Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985).

Riverside established that an applicant's employment history would

routinely have been requested at a second interview. If Gideon had established discrimination or retaliation concerning her first interviews, then the court would have considered Gideon's employment history in evaluating whether Gideon would in any event have been refused employment for non-discriminatory reasons. Such a finding would have been relevant to the question of what remedy is appropriate. However, because Gideon established neither discrimination nor retaliation in connection with her rejection after the first interviews, the district court was not required to consider the evidence relating to Gideon's work history or to make any finding of the type we have described. That the district court included in its findings of fact the evidence relating to Gideon's work history does not change our

view. The conclusions of law make it clear that the court's holding is not based on that evidence.

We have review all of the other issues raised by Gideon and conclude that none of them warrants reversal of the district court's decision.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHEELA A. GIDEON, Plaintiff, v. RIVERSIDE COMMUNITY COLLEGE DISTRICT, Defendant.	No. CV-82-4903 AHS FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on March 5, 6, 7, 8, 13, and 14, 1985, before the Honorable Alicemarie H. Stotler, Judge of the United States District Court. Dale M. Fiola appeared for and on behalf of plaintiff Sheela A. Gideon. Melanie M. Poturica of Liebert, Cassidy & Frierson appeared for and on behalf of defendant Riverside Community College District. Oral and documentary evidence was introduced on behalf of the respective parties, the evidence was

closed and the parties submitted closing arguments by way of written briefs filed with the Court. The matter was submitted to the Court for its consideration and decision, and, after duly considering the above, the Court states its findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Sheela Gideon is a woman of Indian national origin and has resided within the Central District of California at all times material to this action. She was employed by defendant, Riverside Community College District, from on or about 1975 through on or about 1977.

2. Defendant, Riverside Community College District is a public community college district in the Central District of California. Defendant is an employer within the meaning of 42 USC Section

2000e(b) in that it is engaged in an industry affecting commerce and employs more than fifteen (15) persons.

3. This Court has jurisdiction over the subject matter of this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 USC Section 2000e, et seq. ("Title VII") and 28 USC Section 1343, which vest the federal district courts with jurisdiction over actions alleging unlawful discrimination in employment.

4. Venue is properly placed within this judicial district both because plaintiff's employment and applications for employment with defendant were at all times material to this action within the Central District of California, and because the defendant is and was at all times material to this action present within the Central District of

California.

5. Plaintiff filed a charge of discrimination with the California Department of Fair Employment and Housing. That charge was automatically filed with the Equal Employment Opportunity Commission in a timely manner as provided by law. Plaintiff alleged that defendant discriminated against her on the basis of her national origin.

6. The Department of Justice issued plaintiff a "right to sue" notice and within ninety (90) days from the date of receipt, plaintiff filed her original complaint.

7. Plaintiff filed a charge of retaliation with the California Department fo Fair Employment and Housing. That charge was automatically filed with the Equal Employment Opportunity Commission in a timely manner

as provided by law.

8. The Department of Justice issued plaintiff a "right to sue" notice on her retaliation claim and within ninety (90) days from the date of receipt, plaintiff filed her first amended complaint.

9. Riverside Community College District employs certificated personnel, i.e., instructors, in several different categories pursuant to the provisions of the California Education Code. Certificated employees may be full-time or part-time employees. Full-time instructors may be permanent, probationary, temporary, hourly or substitute employees. Likewise, part-time instructors may be permanent, probationary, temporary, hourly or substitute employees. Whether a certificated employee is permanent, probationary, temporary, hourly or

substitute depends upon the length of time that employee has worked for the District, whether the employee was hired on a temporary or full-time basis and other factors which are provided for in the California Education Code.

10. Riverside Community College District utilizes a formal, structured procedure in hiring full-time, non-substitute employees. In 1975 the district adopted an Affirmative Action Policy which set forth this procedure. The policy was revised in February 1977 and April 1980.

11. The stated goal of the Affirmative Action Policy is to promote employment opportunity in recruiting, hiring, training, evaluating and promoting persons without regard to race, color, religion, sex, age, relationship to a present employee, handicap or

national origin.

12. In summary, Defendant's hiring process requires the following:

a. Applicants are initially screened to determine which candidates will be invited for an interview. The Screening Committee consists of the Dean of Academic Services, Division Chairperson and a minimum of two or three tenured members of the division, and at least one female and one ethnic minority member. The Screening Committee is also referred to hereinafter as the Selection Committee or the Interview Committee.

b. A select number of candidates, as a result of the initial screening are interviewed by the same Screening Committee. The Screening Committee selects three candidates to be interviewed by the Superintendent.

c. The Superintendent

interviews the three recommended candidates, makes a choice, informs the Dean of Academic Services of his choice, extends an offer of employment to the successful candidate contingent upon Board approval and submits the recommendation to the Board of Trustee.

13. A Selection Committee normally observes the following guidelines: The initial paper screening is done on an individual basis by each committee member. Each member is provided with a copy of the job announcement which includes the requirements for the position. The member must determine whether an individual applicant meets those requirements. Each Committee member then evaluates each applicant in writing on a candidate screening form.

14. Not all applicants who meet th paper screening requirements are

interviewed. Likewise, an applicant who may be questionable as to a particular requirement may be interviewed. The Committee looks at the applicant's qualifications as a whole in terms of that individual's suitability for a particular position.

15. The members of the Committee who are from the particular instructional division, in this case Nursing, submit questions which they believe would elicit responses useful in evaluating an interviewee's qualifications for the position. The questions are typically discussed and modified and the final questions are typed on the interview sheets.

16. Each Committee member has an interview evaluation sheet with him or her during the interviews. The evaluation contains the questions to be

asked with a grading section after each one and space for comments. The grading section typically contains an area to check superior, above average, average, below average and unsatisfactory. At the end of the interview sheet is a section to grade personal characteristics, education and employment.

17. Prior to the interviews, the Committee Chair, usually the Dean of Academic Services, assigns one or two questions to each Selection Committee members. That person asks the same questions of each candidate. During the interview each candidate is asked the same questions and each candidate is interviewed for the same amount of time.

18. Each Committee member fills out his or her evaluation of the candidate's answer to each particular questions during the interview. Following the

candidate's interview, the Committee member fills out the last page of the interview evaluation. The Committee members do not discuss their grading of the candidates while they are in the process of completing each candidate's interview evaluation. The Committee members do not look at each other's evaluations while they are grading the individual candidates.

19. After all of the interviews are completed the Committee members discuss who they will choose for the Superintendent to interview. They reach a consensus on the two or three candidates to be interviewed by the Superintendent based upon their individual interview evaluations and a collective decision.

20. The three candidates who are sent to the Superintendent to be

interviewed are not ranked in order of preference by the Selection Committee. The Superintendent chooses which candidate should ultimately be hired based upon his evaluation of the candidate.

21. In contrast to the process utilized in hiring full-time, non-substitute instructors, no formal structure is followed in hiring part-time or temporary employees. Prior to 1981, the hiring of part-time or temporary employees was done through the part-time instructional division. Once a department head or division head selected someone from the part-time position they communicated that information to the Personnel Office. The Personnel Office listed the part-time people who were selected by the particular instructional division on the Personnel Report. The

Personnel Report was submitted to the Board of Trustees and subsequently ratified. The Superintendent did not have a role in hiring part-time or temporary employees.

22. The fact that an individual previously worked part-time or as a temporary instructor for the District did not guarantee that person a full-time position when he or she applied. Usually when the District opened a full-time permanent position it received a number of applicants from outside the District.

23. Plaintiff applied for a community college instructor credential on January 31, 1975. She received a temporary teaching certificate that same date. On June 30, 1975 the Board of Governors of the California Community Colleges provided plaintiff a lifetime community college instructor credential

in the subject area of nursing issued effective January 31, 1975.

24. Plaintiff was initially employed by defendant as a daytime hourly employee from February 3 through March 28, 1975 to teach a course entitled Nursing 3B.

25. On August 4, 1976 the Board of Trustees of the District appointed plaintiff as a long term temporary substitute for Marie Donaldson from September 13, 1976 to continue until Ms. Donaldson was permitted by her physician to resume her duties. Ms. Donaldson did not return during that year. Plaintiff consequently served as a long term temporary substitute for the entire 1976-1977 academic year.

26. During the Summer of 1977, plaintiff taught in the Vocational Nursing Program.

27. In the Fall of 1977 plaintiff was employed as a part-time casual employee.

28. In the Summer of 1977, the District announced the opening of a Nursing Instructor position. The academic qualifications were (1) Master's degree in nursing; (2) valid California Community College credential; (3) current license as registered nurse in California. The announcement also stated "Previous teaching experience at the community college level is desirable as is some practical experience in hospital work."

29. Plaintiff applied for the position. At the time of application, plaintiff possessed all of the necessary qualifications announced in the job description.

30. Several other individuals

applied for the position. Plaintiff, Helen Strutz, Ruth Sanders, Patricia Hora and Thera Sass were selected by the Selection Committee for an interview. The Selection Committee was composed of the Associate Dean of Academic Services, James Duncan, the Interim Director of Nursing, Dorothy Steck, and two Associate Professors of Nursing, Phyllis Rojackovick and Thelma Cary. Ms. Cary and Ms. Rojackovick represented the two tenured members of the division. In addition, Ms. Cary, who is Black, represented the ethnic minority members of the college community.

31. Plaintiff and Helen Strutz were not recommended to be interviewed by Foster Davidoff, the Superintendent at the time. The decision not to recommend plaintiff and Ms. Strutz for an interview by the College President was made by the

Interview Committee as a whole and not by an individual member.

32. Helen Strutz had taught previously at Riverside Community College District as a part-time instructor. She had several letters of recommendation in her application packet.

33. Plaintiff received several below average ratings from all of the Committee members. Each member of the Committee rated her as weak in the area of language. Each Committee member commented in writing on the interview evaluation that they had difficulty understanding her.

34. The Selection Committee determined that Patricia Hora, Ruth Sanders and Thera Sass were the candidates best qualified to be interviewed by the Superintendent.

35. Ruth Sanders had previously

taught at Riverside Community College District as a part-time instructor. She had several Letters of Recommendation in her application packet.

36. Thera Sass did not appear for her interview with the Superintendent. Superintendent Davidoff interviewed Ruth Sanders and Patricia Hora. He selected Patricia Hora for the position.

37. Ms. Hora receive very high ratings from the Selection Committee. While Ms. Hora had no paid teaching experience, she taught Bachelor of Science students in Community Health Nursing. She had also done some volunteer teaching. Additionally, she had a considerable amount of practical nursing experience.

38. Ms. Hora applied for her Community College Instructor Credential on July 22, 1977 and was issued a

Temporary Teaching Certificate that same date. The Board of Governors of the California Community Colleges provided Ms. Hora with her Life Community College Instructor Credential on September 23, 1977, issued July 22, 1977.

39. Plaintiff filed her original charge of discrimination with the Department of Fair Employment and Housing on October 13, 9177. This charge was simultaneously filed with the Equal Employment Opportunity Commission as Charge No. 093-78-0217.

40. On July 3, 1978 plaintiff filed a Petition for Writ of Mandate against Riverside Community College District and Foster Davidoff, President of the Riverside Community College District in the Superior Court of the State of California of the County of Riverside. She contended that the interview panel

was not properly constitute and one of the members discriminated against her. She requested that the teaching position for which Patricia Hora was accepted be declared vacant and that new interviews be conducted.

41. The District filed an Answer, a Memorandum of Points and Authorities in Opposition to the Petition and a Declaration fo Foster Davidoff. On August 2, 1978 the Court denied Plaintiff's Petition for Writ of Mandate. Judgment was entered on September 15, 1978.

42. On December 27, 1977 Mary Fiorentino, Director of Nursing at Riverside Community College District, wrote a letter to Sheela Gideon informing her that the Nursing Division would not be requiring her services because it was reducing the number of part-time

instructors. In that letter, Ms. Fiorentino explained that as a result of accreditation visits the Nursing Division was reducing the number of students that it traditionally accepted into the Registered Nursing Program.

43. The Nursing Division eliminated all evening college laboratory hours, shortened the Licensed Vocational clinical hours and combined classes. Consequently, the Division needed fewer instructors. The Director determined that the Division should utilize the full-time faculty to its fullest and provide continuity and cohesiveness to the instructional program.

44. On January 5, 1978 plaintiff met with Howard Larsen,, Dean of Academic Services, and requested that he inform the Director of Nursing of the successful work and service she had provided to the

College in past semesters as a part-time hourly employee or as a substitute employee. Dr. Larsen informed her that there had been a reduction in force and that a decision had been made to more fully utilize full-time faculty in clinical experiences. He also told her that there would be a further reduction in reliance on part-time faculty in the Nursing Division because of proposed changes in the curriculum. Nevertheless, Dr. Larsen requested Ms. Fiorentino to examine Ms. Gideon's competencies and determine whether her skills would permit her future employment if opportunities arose.

45. The Nursing Division records reflect that the number of part-time nursing instructors was reduced from the Fall Semester 1977 and the Spring Semester 1978. The faculty listed as

part-time staff in the Registered Nursing Program according to the Board of Registered Nursing Annual Report in October 1977 were Marie Colucci, Sharon Evans, Sheela Gideon, Maureen Kane, Ruth Sanders and Doris Sewer. That same Report listed only Marie Colucci and Maureen Kane as part-time faculty in March 1978.

46. The District announced three full-time Nursing instructor positions in July, 1978. Plaintiff applied for all three positions.

47. The District decided not to fill the full-time temporary position that it had advertised. The District determined that it would not replace the temporary position. Instead it used hourly employees to fill the position.

48. Plaintiff was not interviewed for either of the two remaining

positions. The Selection Committee members for these positions were not told that plaintiff had filed a charge of discrimination. Some Selection Committee members evaluated her as not meeting job criteria, and other Committee members determined that she did meet the criteria.

49. Ruth Sanders was also not interviewed for either of the positions. She, too, had worked previously at Riverside Community College District. She worked part-time at the District during the Fall of 1976, Spring of 1977 and Fall of 1977. She also had several letters of recommendation.

50. The Selection Committee members rated Ms. Sanders similar to plaintiff's rating on the paper screening. That is, some of the members rated her ass not meeting the requirements and some of the

members rated her as meeting the requirements.

51. Sharon Evans was hired for the Vocational Nursing Instructor position. Ms. Evans was previously the Assistant Director of Nursing Education at Riverside General Hospital, the Director of Nursing at Knollwood Community Hospital, part-time instructor at Riverside City College during the Fall 1977 semester, and Inservice Instructor at Knollwood Community Hospital. In addition, she had several other types of employment experience that were pertinent.

52. Diana Hays was hired for the other full-time Nursing instructor position in 1978. That position was advertised as "...lecture and laboratory instruction in nursing courses with emphasis on senior medical-surgical

nursing including ICU, CCU, team leadership and research seminars."

53. Ms. Hays' background includes the following experiences among others: staff nurse in renal and CCU areas at Mount Sinai Division of Cedars-Sinai Medical Center; Instructor in Medical-Surgical and Team Nursing at Hollywood Presbyterian School of Nursing; Part-time instructor in Medical-Surgical and Critical Care Nursing at California State University, Los Angeles; Instructor in Medical-Surgical at Santa Ana College; Instructor in Medical-Surgical at Cerritos College and Cypress College.

54. The District announced a full-time permanent Nursing Instructor position in May, 1979. The position description stated in relevant part, "Responsible for lecture and laboratory instruction in nursing courses with

emphasis on psychiatric nursing. A combined background of psychiatric and pediatric nursing theory and experience is preferred but will not exclude an applicant with a strong psychiatric background."

55. The Screening Committee met on June 28, 1979 and reviewed nine candidates' applications. It determined that it had an insufficient pool to invite persons for interviews. The position was subsequently readvertised.

56. Following the readvertisement, plaintiff, Helen Strutz and Tim Matthews were selected to be interviewed. Plaintiff received mixed interview evaluations. She was rated Below Average on several questions. Three of the five committee members commented that she was difficult to understand.

57. Helen Strutz was also not hired

for the 1979 position. She had previously worked at Riverside Community College as a Nursing Instructor and had received several letters of recommendation. Ms. Strutz had also applied for the 1977 position and all three 1978 positions. She was not hired for any full-time teaching position at Riverside Community College District.

58. Tim Matthews was hired for the 1979 position. His background included serving as a Psychiatric Nurse Instructor and Assistant to the Director of Nursing Education for the Commonwealth of Pennsylvania Department of Public Welfare at Dixmont State Hospital; Psychiatric Coordinator and Clinical Instructor and Coordinator of the Rehabilitation Program at Sewickley Valley Hospital School of Nursing.

59. Plaintiff applied for the 1981

Nursing Instructor Full-Time Permanent position. The job announcement stated in addition to other requirements, "Two years' experience teaching in a stated accredited, associate in arts/science degree nursing program within the last five years is required." Plaintiff did not meet that requirement and was consequently not chosen to be interviewed.

60. Patricia Hora was selected for the 1981 position. She had previously been employed as a full-time nursing instructor at the District for over two years.

61. Plaintiff worked at Loma Linda University from May 21, 1972 until December 27, 1975. Her termination notices states that she would not be considered for re-hire because she was difficult to work with and she insisted

on having a leadership position.

62. Plaintiff was employed by Chaffey Community College District on September 17, 1975. She received unsatisfactory evaluations from Chaffey community College District on November 15, 1975 and January 30, 1976. The District terminated her from employment on March 10, 1976 because of unsatisfactory evaluations and the lack of ability to communicate with students and staff.

63. Plaintiff filed a complaint with the Fair Employment Practice Commission on April 7, 1976 against Chaffey Community College District. She subsequently filed for Writ of Mandate against Chaffey Community College District in the Superior Court of the County of Riverside on May 21, 1976.

64. Plaintiff worked at Patton

State Hospital from October, 1978 to February, 1981. On or about September 11, 1979 Patton State Hospital suspended her for insubordination. On February 10, 1981 Patton State Hospital suspended her for insubordination. On February 20, 1981 Patton State Hospital issued plaintiff a Notice of Amended Punitive Action. The hospital notified plaintiff that she was dismissed for insubordination and dishonesty.

65. Plaintiff was employed by Riverside Community Hospital from February, 1981 to April 1981. On April 29, 1981 the hospital terminated her for continual failure to meet acceptable levels of job performance.

66. Each and every Conclusion of Law which may properly be a Finding of Fact is incorporated herein as though fully set forth.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this case pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 USC Section 2000e, et seq ("Title VII") and 28 USC Section 1343 as an action alleging unlawful discrimination in employment.

2. To resolve a claim for discriminatory treatment under Title VII, the Court must apply a three-part test. First, the plaintiff must establish a prima facie showing of discrimination. Plaintiff can meet this initial burden by showing that (1) she is a member of a group protected by Title VII, (2) she applied for and was qualified for a position, (3) her application was rejected, and (4) another was hired for the position. See Texas Department of

Community Affairs v. Burdine, 450 U.S. 248 (1981). If plaintiff meets this burden, the defendant must rebut the inference of discrimination by articulating some "legitimate, non-discriminatory reason for its conduct." Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). If defendant successfully articulates a legitimate reason, plaintiff finally must show that the defendant's purported non-discriminatory is, in fact, a pretext, and that unlawful discrimination was a determining factor. Id. at 393.

3. Plaintiff's burden of production in establishing a prima facie case is "not onerous." Burdine, 450 U.S. at 253. Plaintiff has met that burden by showing that she is a member of a class protected by Title VII, that she was qualified to be hired by defendant as a full-time

instructor in each instance except 1981, and that, in each instance, another person was hired instead of her.

4. Defendant has shown that its failure to hire plaintiff was justified by legitimate business reasons. Defendant is entitled to hire whomever it considers to be the best candidate for a nursing instructor position; the evidence shows that skill in communicating in the English language is an important factor in considering an applicant's potential efficacy as an instructor. The Selection Committee's consideration of plaintiff's English proficiency in selecting the best candidates was legitimate and non-discriminatory.

5. Plaintiff has not shown that defendant's proffered business justification is pretextual. There simply has been no factual showing that

the Committee employed plaintiff's national origin as a determining factor in reaching its decision not to recommend plaintiff for an interview with the Superintendent.

6. Plaintiff was treated the same as similarly situated applicants for the 1977 nursing instructor position.

7. Defendant's decision to not re-employ plaintiff and other part-time employees was a result of a reduction in force, not retaliation.

8. Plaintiff failed to establish the necessary causal link between the filing of her national origin discrimination complaint and defendant's decision not to retain her as a part-time employee. Plaintiff filed her complaint in October of 1977. She was employed from September 13 to October 7, 1977 and November 8 to December 1, 1977.

9. Plaintiff was treated the same as similarly situated part-time employees: four of the six part-time employees employed during the Fall semester 1977 were not rehired for the Spring 1978 semester.

10. Howard Larsen's (Dean of Academic Services) conduct in writing a memo to Mary Fiorentino requesting that she consider plaintiff for future part-time employment if it became available supports the determination that defendant did not retaliate against plaintiff.

11. Plaintiff did not sustain her burden of proof that she was not hired in 1978 because of retaliation.

12. Plaintiff was treated the same as similarly situated applicants for the 1978 nursing instructor position.

13. Plaintiff did not sustain her

burden of proof that she was not hired in 1979 because of retaliation.

14. Plaintiff was treated the same as similarly situated applicants for the 1979 nursing instructor position.

15. Disparate impact was not an issue at trial and was raised for the first time in plaintiff's written summation.

16. Plaintiff would not have been hired by defendant, even if discrimination and retaliation are assumed (although contrary to the Court's findings), because defendant has shown by clear and convincing evidence that plaintiff's employment history would have justifiably disqualified her from employment with defendant.

17. Each and every Finding of Fact which may properly be a Conclusion of Law is incorporated herein as though fully

set forth.

18. The Clerk is directed to file and serve these Findings of Fact and Conclusions of Law on all counsel by U.S. mail. the Court further finds it appropriate to order counsel for defendant to prepare, serve, and lodge a proposed Judgment in accordance with the foregoing Findings and Conclusion.

Dated: September 3, 1985

Alicemarie H. Stotler
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHEELA A. GIDEON, Plaintiff, v. RIVERSIDE COMMUNITY COLLEGE DISTRICT, Defendant.	No. CV-82-4903 AHS JUDGMENT

This cause came on for trial on March 5, 6, 7, 8, 13 and 14, 1985, before the Court Honorable Alicemarie H. Stotler, Judge of the United States District Court, presiding. Dale M. Ficla appeared for and on behalf of plaintiff Sheela A. Gideon. Melanie M. Poturica of Liebert, Cassidy & Frierson appeared for and on behalf of Defendant Riverside Community College District. Oral and documentary evidence was introduced on behalf of the respective parties, the

evidence was closed and the parties submitted closing arguments by way of written briefs filed with the Court. The matter was submitted to the Court for its consideration and decision, and a decision having been duly rendered. In accordance with the Findings of Fact and Conclusions of Law rendered by the Court

It is ordered and adjudged

That the plaintiff Sheela A. Gideon take nothing, that the action be dismissed on the merits, and that the defendant Riverside Community College District recover of the plaintiff Sheela A. Gideon its costs of action.

Dated at Los Angeles, California,

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this 23rd day of September, 1985.

Alicemarie H. Stotler
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SHEELA A. GIDEON,

Petitioner

vs.

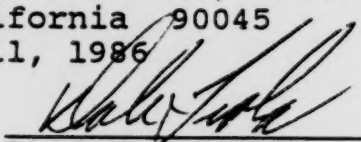
RIVERSIDE COMMUNITY COLLEGE DISTRICT,

Respondent.

CERTIFICATION OF SERVICE

The undersigned, DALE M. FIOLA, the attorney for Petitioner, Sheela A. Gideon, hereby certifies that on the 11th day of December, 1986, he served the foregoing Petition for Writ of Certiorari on all the perties hereto, by mailing three copies by ordinary mail, postage pre-paid, address as follows:

LIEBERT, CASSIDY & FRIERSON
ATTORNEYS AT LAW
6033 West Century Boulevard, Suite 890
Los Angeles, California 90045
DATED: December 11, 1986



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